

RECEIVED DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HALLMARK INSURANCE
COMPANY OF TEXAS,
a foreign corporation,

O R D E R
Civ. No. 09-976-AA

Plaintiff,

vs.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, a foreign
corporation; and JRP DRYWALL
ENTERPRISES, INC., an Oregon
corporation,

Defendants.

AIKEN, Chief Judge:

Plaintiff moves twice for partial summary judgment (docs. 11, 23). Those motions are denied with leave to refile.

Briefly, plaintiff alleges that defendant American Family Mutual Insurance Company ("American Family") failed to indemnify an additional insured general contractor in an underlying action.

1 The underlying lawsuit arose out of a construction site injury
2 suffered by a subcontractor's employee that was allegedly caused
3 wholly or in part by the subcontractor.

4 American Family was the primary insurer for any liability of
5 the general contractor, William Popoff, that was due to the
6 negligence of Popoff's subcontractor, defendant JRP Drywall
7 Enterprises, Inc. ("JRP").¹ During construction work, JRP's
8 negligence caused a serious injury to JRP's onsite supervisor,
9 Gerardo Herrera. Herrera sued Popoff but American Family denied
10 a duty to indemnify. Plaintiff, Popoff's commercial general
11 liability insurer, then settled the case for \$900,000 to protect
12 Popoff against a likely verdict in excess of policy limits.

13 Plaintiff alleges that American Family agreed "by contract"
14 that if plaintiff settled the Herrera case, American Family would
15 limit its defenses in this coverage lawsuit to the following: (1)
16 the policy's Employer's Liability exclusion precludes coverage;
17 and (2) that Or. Rev. Stat. 30.140(1) barred indemnity because
18 there was no claim in the underlying lawsuit that JRP was
19 negligent.

20 Plaintiff's first summary judgment motion asserts that both
21 issues are "purely legal determinations" although "some limited
22 additional discovery will be needed to evaluate the exact amount
23 of JRP's fault and therefore [plaintiff] proposes this issue be
24 briefed separately." Plaintiff's Memo in Support, p. 2.
25 Similarly, plaintiff's second summary judgment motion, also
26 against American Family, moves against American Family's First
27

28 ¹ Defendant JRP is not involved in the motions at bar.

1 and Fifth Affirmative Defenses. Plaintiff alleges those defenses
2 breach the Defense Limitation Agreement ("DLA"). Plaintiff seeks
3 a judgment that the DLA is a binding and enforceable legal
4 agreement that is "clear on its face." Plaintiff's Memo, p. 1.
5 (Motion 2).

6 The parties agree that there were discussions between the
7 carriers at the mediation in the underlying case. The parties
8 further agree that they reached an arrangement to litigate their
9 dispute in a later case. That, however, is where the agreement
10 ends. Unfortunately, the parties failed to reduce to a formal,
11 signed writing their arrangement. The parties now disagree even
12 as to what the parameters of their agreement were. American
13 Family argues that plaintiff has "gone beyond the arrangement
14 negotiated at the conclusion of the underlying case." American
15 Family's Opposition, p. 1. Plaintiff is relying on and
16 attempting to enforce "its version" of a settlement agreement.
17 American Family argues that plaintiff's lawsuit and motion for
18 summary judgment constitute a "repudiation of the carriers'
19 arrangement such that American Family is excused of any
20 obligation." American Family's Opposition, p. 4. Both carriers
21 argue that their version of the arrangement is the only
22 reasonable one. Both carriers assert that the other carrier has
23 misconstrued the arrangement and breached its provisions.
24 Moreover, American Family notes that as the parties continue to
25 participate in discovery, "there may be a basis for Summary
26 Judgment in its favor," specifically on the basis that plaintiff
27 breached the agreement between the parties. Id. at p. 1.

28 The court notes that discovery is not scheduled to close in

1 this case until May 19, 2010. Upon review of the record at this
2 early stage, I find questions of fact as to what the arrangement
3 actually was between the carriers. Specifically, based on the
4 record before me, I find both parties' interpretations of the
5 arrangement are reasonable. I find that genuine questions of
6 fact exist as to the material terms of the agreement between the
7 carriers. Therefore, plaintiff's summary judgment motions (docs.
8 11, 23) are denied with leave to refile. Finally, the parties
9 are encouraged to contact the court if interested in
10 participating in a settlement conference.

11 IT IS SO ORDERED.

12 Dated this 11th day of February 2010.

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17 Ann Aiken
18 United States District Judge
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